

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



# 74-1041

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 74-1041

---

MARIA DIAZ FARO

Plaintiff-Appellant,

-against-

NEW YORK UNIVERSITY

Defendant-Appellee.

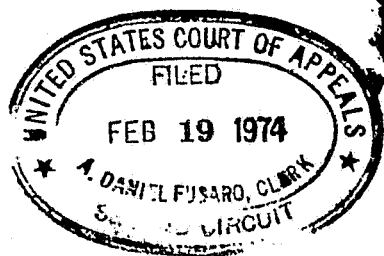
---

On Appeal from the United States District Court  
for the Southern District of New York

---

BRIEF FOR APPELLANT

---



BELLAMY BLANK GOODMAN KELLY  
ROSS & STANLEY  
36 West 44th Street  
New York, N. Y. 10036  
(212) 869-0020

Attorneys for Plaintiff-Appellant

## TABLE OF CONTENTS

ISSUES PRESENTED . . . . .	1
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF THE FACTS . . . . .	3
A. The Operation of the New York University Medical School . . . . .	3
B. Dr. Faro's History at the Medical School . . . . .	9
ARGUMENT . . . . .	
I THE COURT BELOW APPLIED A TOO STRINGENT STANDARD OF PROOF IN DENYING PRELIMINARY RELIEF. . . . .	21
II THE COURT ERRED BY FAILING TO CONSIDER THE EVIDENCE THAT THE MEDICAL SCHOOL'S REASON FOR RE- FUSING TO CONSIDER DR. FARO FOR TENURE WAS PRETEXTUAL. . . . .	31
III THE COURT'S FINDING THAT DR. FARO WAS WILLING TO ACCEPT ONLY A NARROWLY DEFINED FACULTY APPOINTMENT IN THE DEPARTMENT OF CELL BIOLOGY IS CLEARLY ERRONEOUS. . . . .	43
IV THE COURT'S FINDING THAT DR. FARO FAILED TO SHOW IRREPARABLE HARM IS CLEARLY ERRONEOUS. . . . .	48
CONCLUSION. . . . .	54

## TABLE OF AUTHORITIES

### Cases

<u>Afran Transport Co. v. National Maritime Union,</u> 175 F.Supp. 285 (S.D.N.Y. 1959)	53
<u>Burns v. McCrary,</u> 130 F.Supp. 908 (E.D.N.Y. 1955), <u>rev'd on</u> <u>other grounds</u> , 229 F.2d 286 (2d Cir. 1956)	52
* <u>Checker Motors Corp. v. Chrysler Corp.,</u> 405 F.2d 319 (2d Cir.), <u>cert. denied</u> , 394 U.S. 999 (1969).	21 - 22
<u>Citizens Committee for Hudson Valley v. Volpe,</u> 302 F.Supp. 1083 (S.D.N.Y. 1969), <u>aff'd</u> 425 F.2d 97 (2d Cir.), <u>cert. denied</u> , 400 U.S. 949 (1970)	53
<u>Clairol, Inc. v. Gillette Co.,</u> 389 F.2d 264 (2d Cir. 1968)	22, 23
<u>Culpepper v. Reynolds Metals Co.,</u> 421 F.2d 888 (5th Cir. 1970)	26 - 27
<u>Dino De Laurentiis Cinematografica, S.p.A.</u> <u>v. D-150, Inc.,</u> 366 F.2d 373 (2d Cir. 1966)	22
<u>Exxon Corp. v. City of New York,</u> 480 F.2d 460 (2d Cir. 1973)	23
* <u>Gillin v. Federal Paper Board Co.,</u> 479 F.2d 97 (2d Cir. 1973)	31
<u>Griggs v. Duke Power Co.,</u> 401 U.S. 424 (1971)	24

* <u>Gulf &amp; Western Industries, Inc. v. Great Atlantic &amp; Pacific Tea Co.,</u> 476 F.2d 687 (2d Cir. 1973)	21 - 22, 24, 27
* <u>Hamilton Watch Co. v. Benrus Watch Co.</u> 206 F.2d 738 (2d Cir. 1953)	22, 27, 53
<u>Harvey Aluminum Inc. v. American Cyanamid Co.,</u> 15 F.R.D. 14 (S.D.N.Y. 1953)	53
<u>Imperial Chemical Industries Ltd. v. National Distillers &amp; Chemical Corp.,</u> 354 F.2d 459 (2d Cir. 1965)	52 - 53
<u>Johnson v. University of Pittsburgh,</u> 5 FEP Cases 1182 (W.D. Pa. 1973)	51
<u>Kohn v. Royall, Koegel &amp; Wells,</u> 59 F.R.D. 515 (S.D.N.Y. 1973)	28
<u>Leisner v. New York Telephone Co.,</u> 358 F. Supp. 359 (S.D.N.Y. 1973)	30
* <u>McDonnell-Douglas Corp. v. Green,</u> 411 U.S. 792 (1973)	24, 32, 33, 34, 42
<u>Newman v. Piggie Park Enterprises,</u> 390 U.S. 400 (1968)	28
<u>Pettway v. American Cast Iron Pipe Co.,</u> 411 F.2d 998 (5th Cir. 1969)	28
<u>Public Service Commission of Wisconsin v. Wisconsin Telephone Co.,</u> 289 U.S. 67 (1933)	52
<u>Reeber v. Rossell,</u> 106 F.Supp. 373 (S.D.N.Y.), <u>modified</u> , 200 F.2d 334 (2d Cir. 1952)	53

<u>Rios v. Enterprise Association of Steamfitters Local Union No. 638 of U.A.,</u>	
326 F.Supp. 198 (S.D.N.Y. 1971)	30
<u>Semmes Motors, Inc. v. Ford Motor Co.,</u>	31
429 F.2d 1197 (2d Cir. 1970)	
<u>Societe Comptoir de L'industrie Cotonniere Etablissements Boussac v. Alexander's Department Stores, Inc.,</u>	22, 23
299 F.2d 33 (2d Cir. 1962)	
<u>Unicon Management Corp. v. Koppers Corp.,</u>	
336 F.2d 199 (2d Cir. 1966)	22
<u>United States v. Hayes International Corp.,</u>	
415 F.2d 1038 (5th Cir. 1969)	30

#### Statutes

Title VII, Civil Rights Act of 1964,	
42 U.S.C. § 2000e <u>et seq.</u> , as amended	
by the Equal Employment Opportunity	
Act of 1972, P.L. 92-261, 86 Stat.	
103 (March 24, 1972)	2
§ 706(c)	20
§ 706(f)(1)	20

#### Other Authorities

71 Colum. L. Rev. 165	31
1B & 7 Moore, Federal Practice, ¶0.404 at 572 and ¶ 65.04, at 1625 (2d ed. 1966)	22, 53
Ruben & Willis, "Discrimination Against Women in Employment in Higher Education," 20 <u>Cleveland State L. Rev.</u> 472 (1971)	49, 50

Subcommittee on Labor of the Committee  
on Labor and Public Welfare, 92d Cong.,  
2d Sess., Legislative History of the  
Equal Employment Opportunity Act of 1972,  
414 (Comm. Print 1972)

24- 25

Testimony of William H. Brown III,  
Chairman, Equal Employment Opportunity  
Commission, Hearings Part II on H.R.  
16098 Before the Special Subcommittee on  
Education, Committee on Education and  
Labor, 91st Cong., 2nd Sess. at 623 (1970)

28

The Status of Women at the City University  
of New York, A Report to the Chancellor,  
Appendix B: "Selected References, The  
Status of Women in Higher Education" 213  
(1972).

49

\*Cases chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 74-1041

---

MARIA DIAZ FARO

Plaintiff-Appellant,

-against-

NEW YORK UNIVERSITY

Defendant-Appellee.

---

On Appeal from the United States District Court  
for the Southern District of New York

---

BRIEF FOR APPELLANT

---

ISSUES PRESENTED

1. Whether, in considering Dr. Faro's application for an injunction, the district court erred as a matter of law in requiring her to meet a stringent standard of proof.

2. Whether the district court erred as a matter of law by failing to consider evidence that the Medical School's reason for refusing to consider Dr. Faro for tenure -- that she was not in the "tenure chain" -- was pretextual.

3. Whether the district court's finding that Dr. Faro sought and was willing to accept only a very narrowly defined faculty appointment in the Department of Cell Biology is clearly erroneous.

4. Whether the district court's finding that Dr. Faro failed to show irreparable injury is clearly erroneous.

#### STATEMENT OF THE CASE

This case is an appeal of the refusal by the United States District Court for the Southern District of New York to grant a preliminary injunction in a case alleging sex discrimination under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. (1964). The Plaintiff, Dr. Maria Diaz Faro, filed charges of employment discrimination against the New York University Medical School on August 24, 1973. In her charge she alleged that because

of her sex the Medical School had discriminated against her in three ways: (1) it had failed to consider her for tenure and promotion; (2) it currently was seeking to demote her from a full-time faculty position to a part-time research position in order to avoid considering her for tenure and promotion; and (3) it planned to terminate her employment altogether as of December 31, 1973. Dr. Faro sought a temporary restraining order and a preliminary injunction to preserve her full-time faculty status and to prevent the School from firing her until the merits of her discrimination claim could be resolved. The district court (Wyatt, J.) denied the TRO (while expressly reserving any opinion on the merits of the claim) and set a hearing for the preliminary injunction. After a three-day hearing the court (Duffy, J., 73 Civ. 3769) denied Plaintiff's preliminary injunction motion on the grounds that Dr. Faro had failed to show either irreparable harm or a meritorious case.

#### STATEMENT OF THE FACTS

A. The Operation of the New York University Medical School.

The New York University Medical School has a faculty

of approximately 1500 people and consists of twenty-four separate departments. <sup>Def.</sup> ~~Pl.~~ Exh. Z at 42-82, 112-21. The School as a whole is heavily engaged in medical research. Pl. Exh. 8, "Sponsored Research and Training at New York University 1969-1971" at xiv-xvii. <sup>1/</sup> Many faculty members, regardless of the department to which they are appointed, work on research projects, and the School draws heavily on private and governmental grants for its support. <sup>2/</sup> The reason the School does research is not only to bring in money, but to "make New York University one of the major centers for intellectual development in the nation." Pl. Exh. 8 at xviii.

In the Department of Rehabilitation Medicine, research is the primary activity. The Department is otherwise

---

<sup>1/</sup> In 1969-1971, despite "the slacking off of federal support and the increased competition for research dollars, . . . nevertheless, the faculty were successful in undertaking more research and training and allied activities supported from a variety of sources than ever before. Our 1969-1971 expenditures for all these programs reached \$100,617,000 . . . . The Medical Center alone accounted for 48.2 percent of this total . . . ." Pl. Exh. 8 at xiv-xv.

<sup>2/</sup> See, generally, Pl. Exh. 8, section on the Medical School.

known as the Institute of Rehabilitation Medicine,<sup>3/</sup> and every year it receives a large governmental grant (the RT-1 grant) from the United States Department of Health, Education and Welfare for the general support of research, training and patient care activities.<sup>4/</sup> Many faculty members in the Department of Rehabilitation Medicine work on research projects funded by this grant; accordingly, many are paid at various times in whole or in part from RT-1 monies.<sup>5/</sup>

In addition, many members of the Department of Rehabilitation Medicine have secured other grants from other sources and work on these projects as well.<sup>6/</sup> In short, most

---

<sup>3/</sup> See Pl. Exh. 2c, chart on first page, showing the relationship between the Department and the Institute. The district court identified the Institute as the "Rusk Institute," after Dr. Howard A. Rusk, who is both Director of the Institute and Chairman of the Department. Op. at 1-2; Tr. at 143.

<sup>4/</sup> Tr. at 150-51, 117; Pl. Exh. 2c, "Progress Report [on RT-1 Grant]," covering the period between January 1, 1971, through December 31, 1971.

<sup>5/</sup> E.g., Pl. Exh. 2c at 455, 233, 405.

<sup>6/</sup> Pl. Exh. 8 at 104-07. Dr. Rusk testified that the following do research on non-RT-1 projects: Dr. Edward Bergofsky, Dr. Leonard Diller and Dr. Joseph Goodgold, as well as the plaintiff, Dr. Faro. Tr. at 159-60.

members of the Department spend major amounts of time on research and most are paid in part out of research funds. <sup>7/</sup>

As a result, few if any Rehabilitation Medicine faculty members actually spend more than a small percentage of their <sup>8/</sup> time teaching. This is so even for the many members of the

---

<sup>7/</sup> Tr. at 165-73; 191-93.

<sup>8/</sup> If there were any doubt that research and not teaching is the principal activity in Rehabilitation Medicine, a glance at the introduction to the RT-1 book dispels it. Indeed, the existence of this very weighty volume (approximately 600 pages) in itself is evidence that one principal function of the Department must be administering the RT-1 grant. The book states the goals of the Rehabilitation Research and Training Center (of which the Institute/Department of Rehabilitation Medicine is the focus) as: (i) training medical and paramedical personnel; (ii) basic and clinical research; (iii) studies of the factors influencing the handicapped; and (iv) patient services. Pl. Exh. ~~8~~ <sup>2c</sup> at 9. Teaching, therefore, is only one of four functions.

Moreover, the report identifies the director of research and training, currently Dr. Joseph Goodgold, as "responsible for the educational activities of the Department." Pl. Exh. <sup>2c8</sup> at 12. Since Dr. Goodgold spends a considerable amount of time working on research or research-related activities, Tr. at 166, it does not appear that the educational activities of the Department can be more important than any one of several activities, including research.

And, finally, yet another sign that teaching is a secondary, rather than a primary, activity for faculty members in Rehabilitation Medicine is the fact that no one faculty member has exclusive responsibility for any one course. Instead, courses are taught by several persons together. (E.g., Dr. Eberstein's participation -- "he is . . . called on to lecture on his area of expertise" -- in the program for residents. Tr. at 199, 201).

9/

Department who have full academic titles.

In general, the Medical School does everything it can to encourage its faculty to do research. It permits persons with full academic appointments in one department to transfer to other departments -- notably Rehabilitation Medicine -- to work on projects. <sup>10/</sup> It reduces teaching loads so that faculty members will have more time for <sup>11/</sup> research. And it supports its research faculty in a

---

9/ E.g., Dr. Nosrat Naftchi (Associate Professor), estimated teaching time as low as 10%, Tr. at 171; Dr. Arthur Eberstein (Associate Professor), 30%, Tr. at 169; Dr. Menard Gertler (Professor), 20-25%, Tr. at 165; Dr. Albert Haas (Professor), 10-15%, Tr. at 166-67; Dr. Jack Rosenbluth (Professor), 15%, Tr. at 168; Dr. John Sarno (Associate Professor), 30%, Tr. at 170; Dr. Matthew Lee (Associate Professor), 30%, Tr. at 170.

10/ For example, Drs. Jack Rosenbluth and Edward Bergofsky have appointments in the Department of Physiology but both are assigned to do research in Rehabilitation Medicine. Dr. Theobald Reich is in Clinical Surgery and Dr. Harold Brandaleone, in the Department of Medicine but they also are assigned to Rehabilitation Medicine. Def. Exh. Z at 75. Dr. Richard N. Reuben is in Neurology, but is assigned to Pediatrics. Def. Exh. Z at 56. And until this year, when he was permanently transferred to the Department of Rehabilitation Medicine, Dr. Naftchi's appointment was in the Department of Pharmacology, although he too was working in Rehabilitation Medicine. Pl. Exh. 9 at 74.

11/ According to the 1969-1971 report on sponsored research:

The University has continued its support of faculty and of student research through its regular budget. More faculty than ever before have had reduced teaching loads in order to engage in scholarly pursuits or have received modest grants from the several funds administered by the University. Pl. Exh. 8 at xvii.

financial sense by paying their salaries from general <sup>12/</sup> university funds when individual grants are not available.

As a general matter, the Medical School has great flexibility in paying faculty salaries. In administering the RT-1 fund, for example, the Department of Rehabilitation Medicine pays research personnel both from RT-1 money and from general university funds. <sup>13/</sup> The School also pays salaries from the "general research support grant," a grant from the National Institutes of Health used to "sustain research projects which have run into any kind of financial hardship or sustain faculties who are doing research." Tr. 220. In sum, the Medical School can and does pay faculty salaries from a variety of sources: from grants if they are available, or from other university funds if grants are not available. According to Dr. Goodgold, this is not only the practice at NYU; it is a common practice at medical schools everywhere. Tr. at 193.

---

<sup>12/</sup> Dr. Goodgold himself occasionally has been "between grants," and during those periods the Medical School has apparently paid his salary from other sources. Tr. at 191.

<sup>13/</sup> E.g., Compare projects on pages 405 and 233 (predominantly RT-1 funds) with those on pages 410 and 230 (predominantly university funds). Pl. Exh. 2c.

B. Dr. Faro's History at the Medical School.

1. Events Prior to July 1971. Maria Diaz Faro is a research scientist with a Ph.D. in anatomy. Her background is as follows: She received her Ph.D. in 1962 from the University of Pennsylvania. In 1963-65 she was an investigator on a research project on perinatal physiology at the National Institutes of Health laboratory in Puerto Rico. Def. Exh. E at 1. While at Pennsylvania she taught a course in gross anatomy to dental students. Def. Exh. E at 1; Tr. at 83-84. Since receiving her Ph.D. she has engaged in 20 original research projects in her area of expertise: neurological, biochemical and psychological aspects of brain damage suffered at birth. In 13 of these projects she was the principal investigator. Def. Exh. E at 2-4. She has published 13 articles on the results of her research. In 11 of these articles she was the principal author. Def. Exh. E at 5-6.

Dr. Faro first came to the NYU Medical School in 1965 as a member of a research team which, under the direction of Dr. William Windle, was studying the relationship between

asphyxia at birth and brain damage. When the asphyxia team first arrived at NYU, all its members were given full academic titles in the Medical School's Department of Rehabilitation Medicine, where Dr. Windle at the time was a faculty member and the director of research and training (the post presently held by Dr. Joseph Goodgold). These titles were renewed each year, so that from 1965 until September 1973, Dr. Faro has at all times been a full-time member of the Medical School faculty. From 1965 to 1968 she was a full-time Instructor; in 1968 she was promoted and since that time has been a full-time Assistant Professor. Pl. Exhs. 1a-1i; Def. Exh. E at 1; Tr. at 4-5; Op. at 2.

University rules provide that full-time faculty members are eligible for promotion and tenure after seven years in the ranks of instructor and assistant professor. Bylaw 72, Pl. Exh. 3 at 24. Because Dr. Faro was a full-time faculty member, and because she had never been told anything to the contrary, she assumed, until July 1971, that she was in the tenure chain and would be considered for tenure in September 1972 at the end of her seventh year.

Throughout this period of time the asphyxia research in which Dr. Faro was engaged was funded simultaneously through a combination of governmental and private sources. These sources included: a large program grant to Dr. Windle from the National Institutes of Health which ran from 1968 to 1971 (Def. Exhs. F, G, H; Tr. at 105); in 1967, the RT-1 fund administered by the Department of Rehabilitation Medicine (Tr. at 104); and, both prior and subsequent to 1967, from a number of private foundation grants (Pl. Exh. 8 at 105; Tr. at 8, 103-05, 123, 125).

During this period of time Dr. Faro's own salary likewise was paid from a variety of sources. In 1965 her salary came from a National Institutes of Health Grant (Tr. at 7-8); in 1966 and 1967 half her salary was paid from a grant from the Association for the Aid of Crippled Children and half from the RT-1 fund (Tr. at 8, 104, 115-16); from 1968 to February 1971 her salary was paid from the large NIH program grant awarded to Dr. Windle (Def. Exhs. F at 6, G at 4, H at 5; Tr. at 8, 105, 107-08, 110, 116); and subsequent to February of 1971 her salary

was paid from the departmental funds of the Department of Cell Biology (Def. Exhs. X, Y; Tr. at 8) and from the NIH "general research support grant" awarded to the Medical School as a whole (Def. Exhs. Q at 2, R at 2; Tr. at 8).

In addition to her research, beginning with the fall 1970 semester, and continuing through the spring 1971 and fall 1971 semesters, Dr. Faro participated in teaching the Gross Anatomy course in the Department of Cell Biology. This course, although changing slightly in format from semester to semester, <sup>14/</sup> is basically a laboratory course. At the time Dr. Faro taught, few, if any, large general lectures were given. A team of faculty members taught the course. Depending upon the particular course or part of the body being studied, the faculty either gave small group lectures and supervised the students as they dissected their own cadavers or "prosected" (i.e., dissected beforehand)

---

14/ The details of how the course is taught in any one semester depend upon such factors as whether the students are in their first or second year of medical school, the number and condition of cadavers available, and the particular specialties of the participating faculty.

the cadavers and gave demonstrations and lectures on various parts of the body as small groups of students moved from room to room and from table to table in the laboratory. Tr. at 19-23, 25, 83-94. At the time Dr. Faro taught Gross Anatomy, another participant in the course was Dr. Emanuel Alves, a visiting professor from New York Medical College. Dr. Alves' responsibilities in the course were essentially the same as Dr. Faro's: demonstrations and lectures on parts of the body to small groups of medical students, or prosections and lectures, during the laboratory classes. Tr. at 87-90.

At the request of Medical School officials, Dr. Faro also helped organize and teach a course in Medical Spanish, which is still part of the Medical School curriculum. Def. Exh. Z at 38-39. She arranged for participation by other Spanish-speaking teachers, helped develop teaching materials, set up the course procedures, and taught it. Tr. at 23-25, 26, 94-97.

2. The Events after July 1971. In the summer of 1971, just as Dr. Faro was completing her sixth full

year on the faculty, Dr. Rusk wrote letters to her and ten other members of the Department of Rehabilitation Medicine terminating their full-time academic appointments and offering each a new part-time appointment without tenure implications. Pl. Exh. 4. Unlike the others, Dr. Faro refused to accept the new designation. She refused because, although her salary and benefits would remain the same, the new designation would place her outside the tenure chain. Tr. at 180.

After receiving the demotion letter, Dr. Faro went to see her immediate superior in the Department of Rehabilitation Medicine, Dr. Joseph Goodgold. At the meeting she said she wanted to stay in the tenure chain and thought she was qualified to do so since she was teaching both Gross Anatomy and Medical Spanish. Tr. at 16-18, 179-81. She suggested as an alternative that she be given an appointment at her current Assistant Professor level in the Department of Cell Biology where she taught Gross Anatomy. Op. at 6; Tr. at 183. Dr. Goodgold then drafted a memorandum for Dr. Rusk to send to the Department of Cell

Biology. This memorandum recommended the transfer Dr. Faro had proposed. Op. at 6-7; Def. Exh. V. In taking these steps, Dr. Faro, unlike the other persons sent demotion letters, affirmatively put herself forward as a candidate for a full-time faculty appointment in the tenure chain.

Although the Goodgold memorandum was sent, the Medical School did not act on it until Dr. David Sabatini, the new chairman of the Department of Cell Biology, arrived several months later. Tr. at 28, 223-24. Dr. Faro repeatedly tried to reach Dr. Sabatini but was unable to do so until April 1972. Tr. at 29, 61. At that time she told Dr. Sabatini she wanted "an appointment in the department." Tr. at 61. Dr. Sabatini's response was to tell Dr. Faro she could teach Gross Anatomy once again on the same basis she had taught it before (i.e., while on loan from the Department of Rehabilitation Medicine or some other department); but that he could not offer her a full-time academic appointment in the Department itself. Tr. at 29-30, 61-62.

Although the meeting with Dr. Sabatini had resolved nothing, in June Dr. Faro received her usual letter of appointment, renewing her as full-time Assistant Professor of Rehabilitation Medicine for the 1972-73 academic year. Tr. at 31-32; Pl. Exh. 1f. When she received this letter, she concluded, not surprisingly, that the Medical School was not going to remove her from the full-time faculty after all. Tr. at 32. Dr. Faro heard nothing more about her appointment until the following January.

On January 23, 1973, Dr. Goodgold's secretary called Dr. Faro and asked her once again to sign the July 29, 1971 form letter accepting the new employment designation. Dr. Faro, convinced that she and Dr. Goodgold had already settled matters, refused. Tr. at 32. Concerned, however, and unable to reach Dr. Goodgold Dr. Faro wrote to Dr. Rusk on January 29, 1973, to explain her position. Exh. H to Pl. Aff.

In February Dr. Goodgold and Dr. Faro discussed the appointment question again. Dr. Goodgold indicated that Dr. Rusk did not wish to promote Dr. Faro to associate

professor because of finances. Tr. at 185. Dr. Faro said she had never asked for a promotion and that she only wanted to keep her current title as an assistant professor. Dr. Goodgold ended the discussion by saying he would try again to make arrangements to maintain the status quo. Tr. at 34-35, 46

Dr. Faro heard nothing more until March. In March, however, matters came to a head. First, Dr. Faro received a letter from Dr. Rusk terminating her employment with the school altogether, effective December 31, 1973. A few days later she learned that although the school had already renewed her contract for 1972-1973 on a full-time basis, it subsequently had changed her title to the part-time research designation threatened in the July 29, 1971 demotion letter, retroactive to September 1972. Tr. at 36-37; Pl. Exh. 5. At this point, Dr. Faro began to seek other full-time academic employment, but without success. Pl. Exhs. 7a-7h.

After this, events progressed rapidly. On May 11, 1973, Dr. Faro spoke again to Dr. Goodgold and told him that she did not think she should have to leave the Medical School

since other teaching jobs were available, particularly in the Department of Cell Biology, and were being offered to other people rather than to her. Tr. at 40. On May 4, Dr. Faro wrote a second letter to Dr. Rusk. Exh. K to Pl. Affid. In addition she called the Deputy Chancellor's office to discuss the validity of her 1972-73 appointment letter; after some delay the Chancellor told her the letter had been "a mistake." Tr. at 41-42. She met with Dr. Potter, at his request, on June 8, 1973, but that meeting was inconclusive. Tr. at 42, 225-26. Finally, in July Dr. Faro received a memorandum from Dr. Potter about her grievance, asking her to meet with him to proceed towards a satisfactory settlement. Tr. at 45. Both Dr. Bennett, Dean of the Medical School, and Dr. Potter attended this meeting, held on August 6, 1973, but again with no results. Tr. at 45, 227.

During part of this time, while negotiating with the School over her status, Dr. Faro again taught the course in Gross Anatomy, from September 1971 to February 1972. Tr. at 93. Also during this time, the Medical School made the following personnel changes:

- appointed Dr. Emmanuel Alves to the Department of Cell Biology for 1972-1973. Tr. at 49-50, 58.
- appointed Dr. James Shafland, after a somewhat cursory review of his qualifications, to the Department of Cell Biology, beginning September 1973. Tr. at 58-59, 246-47.
- appointed three other persons as Assistant Professors to the Department of Cell Biology in 1973; Dr. Milton Adesnik; Dr. Gert, Dip. Chemiker Kreibich; Dr. James A. Lake. Compare Def. Exh. Z at 43 with Pl. Exh. 9.
- granted tenure to six men in the Department of Rehabilitation Medicine: Drs. Eberstein, Lee, Sarno, Thistle, Weiss, and Reich. Def. Exh. W.

-- brought Dr. Nosrat Naftchi from the Department of Pharmacology, where he previously had held an appointment, to the Department of Rehabilitation Medicine where he is now in the tenure chain. Pl. Exh. 8 at 74; Def. Exh. Z at 75.

On August 24, 1973, convinced at last that the Medical School would not renew her 1973-74 contract and, indeed, would fire her in December, Dr. Faro filed charges of employment discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") and the New York City Commission on Human Rights. Knowing that the EEOC has a heavy backlog of cases, and that she herself would not have the right to sue NYU on the merits of her claim until April 21, 1974 (8 months after the expiration of her 1972-73 contract and nearly 4 months after being dropped from NYU's payroll) <sup>15/</sup>, Dr. Faro moved immediately in the district court for preliminary

---

<sup>15/</sup> Section 706(f)(1) of Title VII provides that the EEOC may not issue a "right-to-sue" letter to charging parties until 180 days have elapsed from the filing of the charge. In New York there is an additional 60 days for the state or city agency to act. § 706(c).

relief. The court denied her motion for a temporary restraining order on August 31, 1973; held a show cause hearing on September 5, 1973; and held a three-day hearing on the motion itself on September 12, 17 and 20, 1973. In these proceedings, Dr. Faro sought not to establish her ultimate right to tenure, but merely her right to maintain her existing position at NYU, as an Assistant Professor, until the merits of her claim of sex discrimination could be resolved.

#### ARGUMENT

##### I

THE COURT BELOW APPLIED A  
TOO STRINGENT STANDARD OF  
PROOF IN DENYING PRELIMI-  
NARY RELIEF.

As this Court stated in Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969), and recently reaffirmed in Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973):

The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the merits, *Unicon Management Corp. v. Koppers Co.*, 336 F.2d 199, 204 (2 Cir. 1966); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2 Cir. 1953); 7 Moore's Federal Practice, ¶ 65.04, at 1625 (2 ed. 1966). It is an extraordinary remedy, and will not be granted except upon a clear showing of probable success and possible irreparable injury. [Emphasis of the Court.] *Clairol, Inc. v. Gillette Co.*, 389 F.2d 264, 265 (2 Cir. 1968); *Societe Comptoir De L'Indus[trie Cotonniere Etablissements Boussac] v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 35 1.A.L.R.3d 752 (2 Cir. 1962). However, 'the burden [of showing probable success] is less where the balance of hardships tips decidedly toward the party requesting the temporary relief.' *Dino De Laurentiis Cinematografica, S. p. A. v. D-150, Inc.*, [366 F.2d 373, 375 (2d Cir. 1966)]. In such a case, the moving party may obtain a preliminary injunction if he has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. *Unicon Management Corp. v. Koppers Co.*, [supra, 366 F.2d at 205]; *Dino De Laurentiis Cinematografica, S. p. A. v. D-150, Inc.*, supra; *Hamilton Watch Co. v. Benrus Watch Co.*, [supra, 206 F.2d at 740]. (Emphasis added.)

A movant traditionally has been required to satisfy the heavier burden of proof where the issues in a case are for the most part straightforward and can be resolved readily, as in the areas of trademark and unfair competition. See, e.g.,

Clairol, Inc. v. Gillette Co., supra, 389 F.2d 264; Societe Comptoir de L'industrie Cotonniere Etablissements Boussac v. Alexander's Department Stores, Inc., supra, 299 F.2d 33.

But in areas of the law where the issues are complex, such as antitrust and securities, this Court has required not that the movant make a "clear showing of probable success" nor exhibit a "strong likelihood of ultimate success on the merits" as did the lower court in the instant case, <sup>16/</sup> but rather, that movant's allegations are of "sufficient substance to warrant an examination of the other requirements necessary to the grant of preliminary relief," i.e., irreparability of harm to the plaintiff pendente lite, balance of hardships an injunction or its absence would impose on the respective

---

<sup>16/</sup> The district court judge's citation in his opinion of Exxon Corp. v. City of New York, 480 F.2d 460 (2d Cir. 1973), for the "strong likelihood of ultimate success on the merits" test is somewhat misleading, since in that case this Court held that application of the more stringent test by the district judge in denying preliminary injunctive relief was improper.

parties, and the public interest. Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., supra, 476 F.2d at 693.

If ever there was an area of the law where the <sup>17/</sup> factual and legal issues are complex, it is Title VII.

As Congress has noted:

. . . In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part

---

<sup>17/</sup> Indeed, the lower court judge misunderstood the issues in several respects. For example, he stated:

. . . I believe that [an evidentiary hearing] should be an invariable procedure in this type of case where factual questions of motive and intent are so deeply ingrained in the relief sought under the statute. Discrimination in and of itself is a concept not easily defined, and it is even more difficult to prove without reference to motive or intent. Op. at 10.

In fact, one need not show an evil motive on the part of an employer to establish a violation of Title VII. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424 (1971). Additionally, the lower court misapplied the rule of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), as discussed infra.

of some identifiable individual or organization. . . . Experience has shown this view to be false.

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, 414 (Comm. Print 1972).

Obviously, obtaining statistical data on these "systems" and their discriminatory "effects" requires extensive discovery, either by the EEOC or by the litigant herself. In a university setting, in particular, discovery is apt to be difficult. The standards for granting promotion and tenure may be difficult to ascertain, particularly when they depend in large part on the subjective judgments made by the charging party's professional colleagues. Faculty handbooks and catalogs, while easy to obtain, may not provide much hard evidence. The case usually will have to be proved circumstantially by examining the university's recruitment,

compensation, promotion and termination procedures and by analyzing the way these procedures are applied to the claimant personally, or to the class she represents, as compared to the way they are applied to her male colleagues. This is exactly the kind of statistical evidence that can be obtained only through extensive discovery, either by the EEOC or the litigant herself. It is impossible for a plaintiff to amass this type of data to support a motion for preliminary relief when it is necessary, as it was for Dr. Faro, to bring on such a motion in a very fast emergency proceeding.

Indeed, if a plaintiff in Dr. Faro's position, threatened with imminent loss of her livelihood, is unable to obtain meaningfully preliminary relief,<sup>18/</sup> the Act is not accomplishing its objective.

Title VII is broad remedial legislation, the sole purpose of which is to eradicate employment discrimination, "one of the most deplorable forms of discrimination known to our society." Culpepper v. Reynolds Metals Co., 421 F.2d 888,

---

<sup>18/</sup> In view of the fact that the basis for plaintiff's action at this stage of the proceedings is for a preliminary injunction only (see Complaint at 4), and that at no time did she ever request a permanent injunction, the district court judge's statement that Dr. Faro commenced an action "for a preliminary and permanent injunction" (Op. at 10) is totally incorrect.

891 (5th Cir. 1970). The duty of the courts in dealing with this type of legislation is to "make sure that the Act works." Id. Just as this Court has applied the less stringent standard of proof to other cases involving broad remedial legislation, such as securities and antitrust, see, e.g., Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., supra, 476 F.2d 687; Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d 738, so too, it should apply that standard to Title VII cases.

In the Gulf & Western case this Court emphasized the important role played by private litigants in enforcing such remedial legislation.

Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their [private] capacities . . . which incidentally benefit the general public interest, perform a vital public service. 476 F.2d at 699.

Likewise, Title VII contemplates the elimination of sex discrimination in employment through suits by litigants

acting in their individual capacities. Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973); cf. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

Since the enforcement of Title VII depends largely upon the willingness of individuals with slender resources to take on institutional defendants in what has been characterized as a "modern day David and Goliath confrontation," Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969), the burden of proof these plaintiffs are held to meet on a motion for a preliminary injunction should not be so stringent as to preclude the possibility of their obtaining meaningful interim relief. As it is, comparatively few private individuals have overcome their natural reluctance to undertake the strain of long and arduous Title VII litigation, even after <sup>19/</sup> investigation by the EEOC. Because it takes substantial

---

<sup>19/</sup> As of 1970, in only 10% of the approximately 8,000 cases in which the EEOC has found "reasonable cause" to believe discrimination existed and in which conciliation was unsuccessful, were suits subsequently filed against respondent employers. Testimony of William H. Brown III, Chairman, Equal Employment Opportunity Commission, Hearings Part II on H.R. 16098 Before the Special Subcommittee on Education, Committee on Education and Labor, 91st Cong., 2nd Sess. at 623, 629 (1970).

time and money <sup>20/</sup> to litigate; because recovery is uncertain; and, particularly in cases like this one, because the plaintiff is likely to be criticized in the academic community for suing the university at all, the added requirement that she must meet an unreasonably high standard of proof will inevitably discourage her from even attempting to enforce her Title VII rights.

Moreover, in a case like this one there is an additional reason for holding the plaintiff to a less stringent standard of proof. Dr. Faro sought, not a final award of tenure, or an award of damages, or a final determination that the university was discriminating. All Dr. Faro sought in this proceeding was an injunction requiring that until these

---

<sup>20/</sup> Even though Title VII provides for an award of attorneys' fees to successful complainants, these usually are not awarded until the end of the litigation -- frequently years from the date of institution of suit. Since few attorneys are able or willing to carry the expense of litigation for such a long period on their own, private litigants frequently must pay a charge that covers at least the attorney's overhead and disbursements connected with their lawsuits. These payments can run into substantial sums, especially to one whose salary is low as a result of discrimination or, as in Dr. Faro's case, is unemployed because of discrimination.

8-21-73  
matters were resolved, the School maintain her in a position she had already held for 8-1/2 years to the School's satisfaction. Since the relief she sought was only interim relief, she should not have been required to prove her case in its final and absolute sense, without discovery and without the assistance of the governmental agencies with expertise in the area.

The issue then of which standard of proof is proper in Title VII cases where the plaintiff moves for preliminary relief to preserve the status quo before the government has investigated and before the plaintiff has a right to proceed in federal court for a permanent injunction is one of first <sup>21/</sup>impression. Plaintiff urges this Court to hold that the

---

<sup>21/</sup> This situation is to be distinguished from that presented in, e.g., Leisner v. New York Telephone Co., 358 F.Supp. 359 (S.D.N.Y. 1973), wherein the plaintiffs sought a preliminary injunction, in that in Leisner the EEOC already had conducted a massive investigation of sex discrimination at the telephone company and made this data available to plaintiffs. In other Title VII cases wherein plaintiffs have sought preliminary relief, e.g., United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); or Rios v. Enterprise Association of Steamfitters Local Union No. 638 of U.A., 326 F.Supp. 198 (S.D.N.Y. 1971), the EEOC already had investigated the plaintiffs' charges and had made unsuccessful attempts at conciliation. Nor were any of those cases emergency proceedings. Here, of course, Dr. Faro went to court because she was threatened with imminent loss of livelihood and damage to reputation.

less stringent standard is proper in this situation. Once plaintiff has shown that her allegations are of "sufficient substance", i.e., that she has established a prima facie case of employment discrimination, see Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970); 71 Colum. L. Rev. 165, 170, a preliminary injunction should issue to maintain the status quo pending investigation into the charges by the federal or state agency.

## II

THE COURT ERRED BY FAILING TO  
CONSIDER THE EVIDENCE THAT THE  
MEDICAL SCHOOL'S REASON FOR RE-  
FUSING TO CONSIDER DR. FARO FOR  
TENURE WAS PRETEXTUAL.

The district court held that Dr. Faro was not entitled  
22/ to tenure because she was paid out of special research grants

---

22/ The court apparently did not understand that in this preliminary proceeding, Dr. Faro sought not tenure itself, but only the opportunity to be considered for tenure. This Circuit has, of course, unequivocally held that the failure to consider a female applicant for a job (or tenure), regardless of whether she is ultimately qualified to hold it, is in itself illegal sex discrimination. Gilllin v. Federal Paper Board Co., 479 F.2d 97 (2d Cir. 1973).

and was covered by Medical School rules which say that such persons are outside the tenure chain. Op. at 15-16. But the evidence shows that most faculty members, including those with tenure, also are paid from grants. Therefore the School's reason is pretextual. The court's failure to consider the evidence to that effect was legal error under McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

In Green the Supreme Court set forth the standards for proving an individual charge of sex discrimination under Title VII. The Court held that a plaintiff can make out a prima facie case by showing the following:

1. that she belongs to a class protected by Title VII;
2. that she applied for a job for which she was qualified;
3. that she was not considered or was rejected for the job; and
4. that the employer continued to seek applicants from men of comparable qualifications. 411 U.S. at 802.

An employer may try to rebut such a prima facie case by showing that he rejected the plaintiff for a valid non-discriminatory reason; but the plaintiff can then re-establish her case by showing that the employer's reason

was only pretextual. "Especially relevant" to such a showing is evidence that the job criterion was not applied to both sexes equally.<sup>23/</sup> 411 U.S. 804.

In this case Dr. Faro made out a prima facie case under the Green standards by showing that she was a woman protected against job discrimination by Title VII; that

---

23/ Green also held that a plaintiff can prove pretextuality through statistics. In this case, however, the statistics cited in the opinion are not controlling for two reasons. First, Dr. Faro did not rely on statistics to prove her case, but showed in another way that the tenure chain argument was pretextual: because the School applied it to no one but Dr. Faro. Second, the statistics themselves are not an accurate index to NYU's employment practices. Although they do give the percentage of tenured faculty who are female, they do not provide equally relevant data: i.e., the percentage of women broken down by department; the rate at which female faculty are promoted; or a comparison between male and female salaries. The plaintiff was unable to provide such data because of the unavailability of discovery and the emergency nature of the proceedings. Without such data, however, the district court was not in a position to draw ultimate conclusions about the existence or non-existence of discrimination.

The figures also are inadequate because they compare the percentage of tenured female faculty with only one other figure: the percentage of medical doctors who are female. Since NYU also draws its medical faculty from Ph.D.s, the qualified applicant pool is larger than the Medical School's figures would indicate.

she asked to be considered for tenure, for which, as a full-time member of the faculty for seven years, she was soon to be eligible; that the Department of Rehabilitation Medicine refused to consider her tenure application (Tr. at 154, 179, 248); and that the Department did award tenure to men of comparable qualifications during the same period of time. Def. Exh. W. The Medical School responded by claiming that Dr. Faro was not eligible to be considered for tenure because she was paid during part of the time she was on the faculty out of grants. As was her right under Green, Dr. Faro then introduced evidence that this reason was pretextual because, although it was true that she was paid partly from grants, many tenured faculty members in the Department also were paid in this way. This evidence included the following:

-- Dr. Goodgold's testimony that most of his salary for most of the time he has been in Rehabilitation Medicine was paid from individual grants. In his words, he "brought in his own support for most of his time at the School." Tr. at 191.

- Dr. Goodgold's testimony that the same is true for four other members of the Department, all men with tenure: Dr. Menard Gertler, Dr. Leonard Diller, Dr. Edward Bergofsky and Dr. Arthur Eberstein. Tr. at 191-93.
- Dr. Goodgold's testimony that yet another male faculty member, Dr. Nosrat Naftchi, who does not have tenure but is in the tenure chain, also is paid heavily out of research money. Tr. at 171, 187, 192.
- Dr. Goodgold's testimony that in all departments of the Medical School the general practice is to pay faculty, tenured or non-tenured, out of grants when grants are available. Tr. at 193.
- evidence such as the RT-1 book which shows that the Department of Rehabilitation Medicine, where Dr. Faro sought tenure, is primarily a research department; that most

professors in the Department work on RT-1 projects; and accordingly, that most are partly paid from the RT-1 grant, which is a restricted purpose "special" grant. Pl. Exh. 2c; Tr. at 152, 251.

-- evidence that, in particular, Drs. Eberstein, Reich, Bergofsky, and Naftchi, all worked on RT-1 projects during 1971 from which at least a part of their salaries were paid. E.g., Pl. Exh. 2c at 233 (Bergofsky); 405 (Eberstein); 287 (Reich); 455 (Naftchi). Evidence that these same persons are either tenured (Def. Exh. W) or are considered in the tenure chain. Tr. at 187.

-- evidence such as the Sponsored Research book, showing that many members of the Medical School faculty hold individual grants from which they may be paid. Pl. Exh. 8 at 104-07.

The district court, however, considered none of this material. Consequently, it failed to draw the obvious conclusion: that in refusing to consider Dr. Faro for tenure because she was paid from grants, the Medical School was discriminating against her because it did not apply that criterion equally to both sexes. Therefore under Green the School's reason for not considering Dr. Faro for tenure was pretextual.

The court also ignored evidence that although Dr. Faro was not considered eligible for tenure, male candidates of comparable qualifications in her department were. The evidence shows, for example, that Dr. Eberstein was granted tenure in 1971, during the same year Dr. Faro was asked to sign a letter removing herself from the tenure chain. Def. Exh. W; Pl. Exh. 4. In that year, according to Pl. Exh. 2c, Dr. Eberstein was working on two research projects under the RT-1 grant on which he spent a total of 40% of his time. Pl. Exh. 2c at 405, 410. In addition, he held another, separate grant on "Electrophysiologic Studies in Induced Myotonic Muscle." Pl. Exh. 8 at 105. He was one of the members of the Department of Rehabilitation Medicine who always had been paid from grants. Tr. at 192. Dr. Eberstein currently teaches no

more than 30% of his time. Tr. at 169. That estimate may be inflated, since his specific duties are: to teach 1/3 of a three to five day post-graduate course which is taught twice a year (a total of no more than three days at maximum) (Tr. at 204); and to lecture to a small group of residents for an hour and a half on "certain mornings" when his area of expertise is discussed, the number of times he so lectures being unspecified. Tr. at 198-201. Like Dr. Faro, Dr. Eberstein is a Ph.D. He is an Associate Professor and was given tenure in 1971. Def. Exh. Z at 75; Def. Exh. W.

Dr. Naftchi is also a Ph.D. Def. Exh. Z at 75. Although he has not yet been given tenure, he is considered in the tenure chain. Tr. at 187. In 1971, he too was working on RT-1 projects, and was spending a total of 75% of his time on them. Pl. Exh. 2c at 455, 460, 472. He has always been paid and is now being paid from special grants. Tr. at 192. According to Dr. Goodgold, Dr. Naftchi teaches between 25-35% of his time; according to Dr. Rusk, no more than 10-15%. Tr. at 193; 171. He does not, in fact, teach a formal course. Tr. at 194.

Dr. Bergofsky is an M.D. who was granted tenure in 1969. Def. Exh. W. Like Drs. Naftchi and Eberstein, he too has always been heavily paid from grants. Tr. at 192. He held two individual grants in the period 1969-1971 (Pl. Exh. 8 at 105); and in 1971, he also worked on five separate RT-1 projects as well. These five projects alone took up 80% of his time. Pl. Exh. 2c at 223, 226, 230, 233, 417. It is clear that during the period Dr. Bergofsky was given tenure and shortly thereafter, he could not have been spending much of his time teaching.

When one compares Dr. Faro's record to the records of her three male colleagues, the disparate treatment becomes painfully obvious. In 1971, Dr. Faro was spending 50% of her time working on a project under the RT-1 grant. Pl. Exh. <sup>24/</sup>2c at 300. In addition, during the same period she held four other grants. Pl. Exh. 8 at 105. This shows she was

---

<sup>24/</sup> Dr. Faro also worked on a second RT-1 project in 1971 but the project ended in February and obviously did not occupy her time for the whole year. Pl. Exh. 2c at 541.

spending substantial time on research, but certainly no more than the men. Nor was her position any different in other ways. She was a Ph.D. rather than an M.D., but so were Drs. Eberstein and Naftchi. She was paid at various times from grants, but so were all three of the others. As to teaching, in 1971 she taught Gross Anatomy and Medical Spanish in the spring and Gross Anatomy a second time in the fall. According to Dr. Faro's uncontradicted testimony, this amounted to a total of 2-1/2 days per week of teaching each semester for Gross Anatomy and an additional 9 hours per week in the spring for Medical Spanish. Tr. at 91-93. Nor was her teaching different in kind. In Gross Anatomy, using a partly dissected cadaver, she worked with small groups of students, demonstrating and lecturing on the parts of the body. Tr. at 88-90. This was as much teaching as was done by Dr. Eberstein who also gave demonstration-lectures to small groups of students, but apparently to fewer students and possibly fewer times per week. It certainly was more teaching than was done by Dr. Naftchi, who, according to Dr. Goodgold, was an "independent investigator,"

doing "individualized work" and had no formal teaching responsibilities whatsoever. Tr. at 197, 194.<sup>25/</sup>

Thus the evidence, had the district court considered it, shows clearly that in 1971, when Dr. Faro first indicated her interest in tenure, she was in the same position with respect to teaching and research responsibilities and source of salary as other, male, members of the Department of Rehabilitation Medicine. Yet Dr. Faro was not considered for tenure and her male colleagues either were given tenure or are today considered in the tenure chain.

More importantly, the evidence also shows

---

<sup>25/</sup> The Medical School's definition of "teaching" seems to vary depending on whether the School is discussing Dr. Faro or one of her male colleagues. Dr. Goodgold testified that Dr. Naftchi's teaching included "contacts with medical students, the residents and ancillary personnel," both formal and informal. Tr. at 195, 194. Yet in concluding that Dr. Faro did not teach in the Department of Rehabilitation Medicine, he admitted he was considering only the fact that she taught no "formal lectures," and in fact did not know what work she did with students in the laboratory. Tr. at 206.

that although Dr. Faro was paid in part from medical research grants, this is true of nearly every other faculty member in her department, including male members of the faculty who are tenured. Under Green, the court should have considered this evidence. Had it done so, it would have found that NYU's tenure chain argument was pretextual; that Dr. Faro had therefore shown a likelihood of success on the merits; and that given this fact she was entitled to a preliminary injunction until the case could be fully investigated and resolved.  
26/

---

26/ Although the court did not deal directly with the issue, NYU also argued below that it could not consider Dr. Faro for tenure because, once her asphyxia project grant terminated, the school had no money to pay her salary for a tenured appointment. The evidence shows this argument is also pretextual for the following reasons: (1) The School could have paid Dr. Faro out of the research support grant, created expressly to "sustain research projects which have run into any kind of financial hardship." Tr. at 220. (2) The School could have paid Dr. Faro out of the RT-1 fund since, while one aspect of her research is no longer eligible for these funds (Def. Exh. N, Dr. Faro's project on "The Breeding Program in Macaca Mulatta), other aspects of the research continued to be eligible until January 1974. Def. Exhs. O, P, Q and R. Although the particular project on which Dr. Faro was working expired on that date, there is no reason another project proposal could not have been written and submitted to the government for funding. (3) The School could have paid Dr. Faro out of general university funds, just as it apparently has paid Dr. Goodgold himself when he was "between grants." Tr. at 191. This is what the Medical School normally does when grant money is not available. Tr. at 193.

### III

THE COURT'S FINDING THAT DR. FARO  
WAS WILLING TO ACCEPT ONLY A  
NARROWLY DEFINED FACULTY APPOINT-  
MENT IN THE DEPARTMENT OF CELL  
BIOLOGY IS CLEARLY ERRONEOUS.

The district court also found that the Medical School did not discriminate against Dr. Faro in failing to consider her for a full-time faculty appointment in the Department of Cell Biology because the kind of job she wanted did not exist. Op. at 13-14. Specifically, the court says Dr. Faro would take no position unless it (1) was tenured; (2) would permit her to teach gross anatomy; (3) would allow her to continue her research in the Department of Rehabilitation Medicine; and (4) would let her use Cell Biology graduate students to work on her research. Op. at 7.

This finding -- that Dr. Faro so narrowly defined the kind of faculty appointment she would accept -- is so contrary to the weight of the evidence as to be ludicrous. First, there is not a shred of evidence in the

record that Dr. Faro ever insisted on a Cell Biology appointment with tenure. Indeed, there is substantial evidence that Dr. Faro was actively pursuing a Cell Biology appointment without tenure. The evidence shows that in September 1971, in her very first meeting with Dr. Goodgold after receiving the termination notice in July, Dr. Faro asked for a transfer to the Department of Cell Biology at her existing level of appointment; that is, as an untenured Assistant Professor. Def. Exh. V; Tr. at 183. Indeed, the district court made this factual finding itself. Op. at 6-7.<sup>27/</sup>

Moreover, over the next two years Dr. Faro repeatedly expressed her interest in an untenured appointment. It is clear that although she was certainly interested in securing tenure at some point in the future, her immediate interest was in fighting off the School's efforts to remove her from the faculty and in staying within the tenure chain. Thus, in February 1972, she told Dr. Goodgold "that if he

---

<sup>27/</sup> The evidence shows that Dr. Goodgold recommended the transfer; but that, in effect, Dr. Sabatini vetoed it. Def. Exh. V; Tr. at 29-30, 61-62.

could not promote me, I wanted to keep my own title, but I didn't want to accept an academic demotion like the one they were giving me." Tr. at 34. And again, in talking to Dr. Goodgold: "I don't ask you to give me a promotion, don't give me a demotion, just leave me where I am."

(Emphasis added.) Tr. at 34-35. And, yet again, on August 6, 1973, to Dr. Bennett, the Medical School Dean and Dr. Potter, the Associate Dean: Dr. Faro's objective was not to secure tenure, but "to see if they could maintain my assistant professor status and not have to be demoted."

(Emphasis added.) Tr. at 46.

The Plaintiff also emphasized this point in her January 29, 1973 letter to Dr. Rusk. She did not want to accept the new designation because "I would very much like to maintain a position which will have the potential for <sup>28/</sup>tenure." Exh. H to Pl. Affid.

As to Dr. Faro's other, supposedly inflexible

---

<sup>28/</sup> See also Exh. K. to Pl. Affid. - Faro letter of May 4, 1973, to Dr. Rusk which discusses "an appointment" in the Department of Cell Biology.

job requirements, it is true that when the Plaintiff first went to see Dr. Sabatini in April 1972, she was interested in an appointment which would let her continue her research (not an unreasonable expectation, since many male faculty members have appointments in one department but work on research in another -- see footnote 10), as well as teach. But whatever her original hopes may have been, by spring of 1973 Dr. Faro was fighting for her professional life. By this time she had received Dr. Rusk's letter of March 23 terminating her employment altogether as of December 31, 1973. At this point, Dr. Faro would have accepted any teaching job, certainly in Cell Biology and probably in any department of the Medical School, which accomplished two things: (1) kept her in the tenure chain; and (2) provided her with a full-time salary. On May 11, she indicated this fact very clearly, when she told Dr. Goodgold that she did not see why she should leave the Medical School in December since the School had other teaching jobs which it was offering to men and not to her <sup>29/</sup>

---

<sup>29/</sup> Dr. Faro also showed that her main interest was in teaching when she applied to other medical schools (like the NYU dental school -- see Pl. Exh. 7h) where asphyxia research would have been impossible.

(e.g., jobs given to Drs. Shafland, Adesnik, et al., in the Cell Biology Department).

In any event, to treat Dr. Faro's Cell Biology application as if there were a particular "job" for which she was applying is to totally misunderstand the way the Medical School works. What Dr. Faro sought was not a "job," with specific limits or parameters, but an appointment on the same terms and conditions as appointments are made, throughout the Medical School, to men. That is, Dr. Faro wanted an appointment which would allow her to continue teaching a course in her area of expertise; which would let her continue her research; and which would give her an opportunity to be considered for tenure. When she realized NYU would not give her such an appointment, Dr. Faro indicated through her words and her actions that she would consider any appointment which maintained her faculty status and paid her a full-time salary. The court's conclusion that at all times Dr. Faro would consider only a very narrowly defined appointment in the Cell Biology Department is clearly erroneous.

IV

THE COURT'S FINDING THAT DR.  
FARO FAILED TO SHOW IRREPARABLE  
HARM IS CLEARLY ERRONEOUS.

The lower court, without discussion, found that plaintiff had failed to demonstrate any irreparable harm entitling her to preliminary relief. Op. at 18. This finding is contrary to the weight of the evidence and is clearly erroneous.

The evidence shows that Dr. Faro has been irreparably injured by the Medical School's actions in several ways. First, she has been injured monetarily and will continue to be so injured until and unless she is able to find other academic employment. Second, and more importantly, she has been injured because NYU's actions against her have inevitably damaged her professional and academic reputation.

On the question of securing other employment, the record shows that from April 9, 1973, when it became increasingly apparent that she was going to have to

leave NYU Medical School in December, to the time of the district court hearing in September of 1973, Dr. Faro made strenuous efforts to obtain a position in another medical school. She talked to almost every chairman of the different medical schools in this area and sent them her curriculum vitae. This diligence unearthed only two currently available positions: one at the NYU Dental School and one at New York Medical College. Dr. Faro was rejected for both positions. Tr. at 37-38, 44; Pl. Exhs. 7f, 7h.

Moreover, this is not a case where the plaintiff, being dismissed from one position, can readily find another. Employment discrimination against women in higher educational institutions has been well documented. See, e.g., Ruben & Willis, "Discrimination Against Women in Employment in Higher Education," 20 Cleveland State L. Rev. 472 (1971) and references contained therein; The Status of Women at the City University of New York, A Report to the Chancellor, Appendix B: "Selected References, The Status of Women in Higher Education," 213 (1972). Even allowing for the fact that because women have been under represented at all levels of higher education and because their areas of study have been

concentrated within a narrow range the available pool of women is smaller than that of men, "the number, rank, and compensation of females actually employed in higher education have been so significantly less than expected as to warrant the conclusion of widespread, deliberate discrimination." (Footnote omitted.) 20 Cleveland State L.Rev. at 473. Even with a spotless record, it can reasonably be assumed that Dr. Faro would have a difficult time finding other employment in academia commensurate with her abilities because of the sex-bias prevalent in higher educational institutions.

In order to find another position, Dr. Faro not only must fight the sexism in other institutions of higher learning, but also must overcome the blot on her own record that being denied tenure, demoted and fired has left. Defendant's own witness, Dr. Jacobus Potter, testified that the Medical School would "certainly give . . . very careful scrutiny before offering an appointment" to any individual from a medical school faculty who had been denied tenure, whose faculty status had been reduced from full-time to part-time, and who subsequently had been dismissed. Tr. at 237-38.

Finally, it is a mere exercise in common sense to realize that the longer Dr. Faro is unemployed, the more difficult it will be for her to obtain another academic position commensurate with her professional abilities or to return to the mainstream of the scientific community. While Dr. Faro is away from her field of expertise, other scientists are forging ahead making discoveries that she could be making; other scientists are accruing the experience (teaching and otherwise) and seniority necessary for promotion she could be accruing; and other scientists are making the professional contacts in the scientific and academic community necessary to get ahead that she could be making. No amount of money damages or eventual reinstatement to her former position can undo the harm Dr. Faro already has suffered and the harm she continues to suffer each day she is in exile from the scientific and academic community. Indeed, it is a recognized fact that discharge and denial of tenure is in itself extremely damaging to the reputation of a professional academician. Johnson v. University of Pittsburgh, 5 FEP Cases 1182, 1188 (W.D. Pa. 1973).

Weighed against the harm to Dr. Faro of not granting preliminary relief in this case, any harm accruing to the defendant by keeping Dr. Faro on as an Assistant Professor is negligible. Since Dr. Faro has always been a satisfactory employee, it would be no hardship to NYU to keep her as a full-time Assistant Professor until the merits of this controversy are resolved. And it has been held that a large employer's claim that it will suffer irreparable loss by having to keep an employee on at salary has "no appreciable merit." Burns v. McCrary, 130 F.Supp. 908, 909 (E.D.N.Y. 1955), rev'd on other grounds, 229 F.2d 286 (2d Cir. 1956). Defendant's argument that irreparable harm would accrue to it because a determination that it was guilty of unlawful discrimination in employment would call into question its various grants and contracts with federal, state and city agencies overlooks the point that granting a preliminary injunction in the instant case is not dependent upon the court's making an absolute finding of discrimination.<sup>30/</sup> Even if it is ultimately found that

---

<sup>30/</sup> Moreover, it is hornbook law that any findings, either factual or legal, made on a motion for a preliminary injunction are not the law of the case. Public Service Commission of Wisconsin v. Wisconsin Telephone Co., 289 U.S. 67, 70 (1933); Imperial Chemical Industries Ltd. v. National Distillers &

NYU was indeed guilty of sex discrimination, any adverse effect such a finding would have on defendant's contracts with various governmental agencies would not give it a license to continue discriminating!

Clearly, Dr. Faro has suffered, and will continue to suffer, irreparable harm if she is denied preliminary relief, harm that far outweighs any harm to defendant from granting such relief to maintain the status quo pending further investigation into the merits.

---

Footnote 30 continued

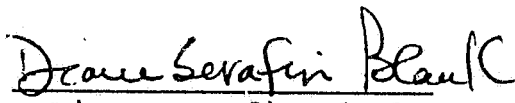
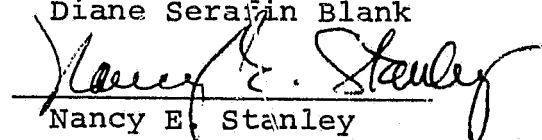
Chemical Corp., 354 F.2d 459, 463 (2d Cir. 1965); Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 742-43; Citizens Committee for Hudson Valley v. Volpe, 302 F.Supp. 1083, 1088 n. 2 (S.D.N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970); Afran Transport Co. v. National Maritime Union, 175 F.Supp. 285, 287 (S.D.N.Y. 1959); Harvey Aluminum Inc. v. American Cyanamid Co., 15 F.R.D. 14, 20 (S.D.N.Y. 1953); Reeber v. Rossell, 106 F.Supp. 373, 375-76 (S.D.N.Y.), modified, 200 F.2d 334 (2d Cir. 1952); 1B Moore, Federal Practice, ¶ 0.404, p. 572. The rationale of such a rule lies in the fact that "a preliminary injunction . . . is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 742.

CONCLUSION

For the reasons stated above, the Appellant respectfully asks this Court to reverse this case and to remand to the district court with instructions to grant a preliminary injunction by:

1. reinstating the Appellant as a full-time Assistant Professor until the Equal Employment Opportunity Commission has investigated the merits of her charge; or until such other time as this Court thinks appropriate;
2. award Appellant back pay for the period of time she has been unemployed.

Respectfully submitted,

  
Diane Serafin Blank  
  
Nancy E. Stanley

BELLAMY BLANK GOODMAN KELLY  
ROSS & STANLEY  
36 West 44th Street  
New York, New York 10036  
212 869-0020

Attorneys for Appellant

February 19, 1974

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing  
brief for the Appellant have been mailed this day, postage  
prepaid, to the following counsel of record:

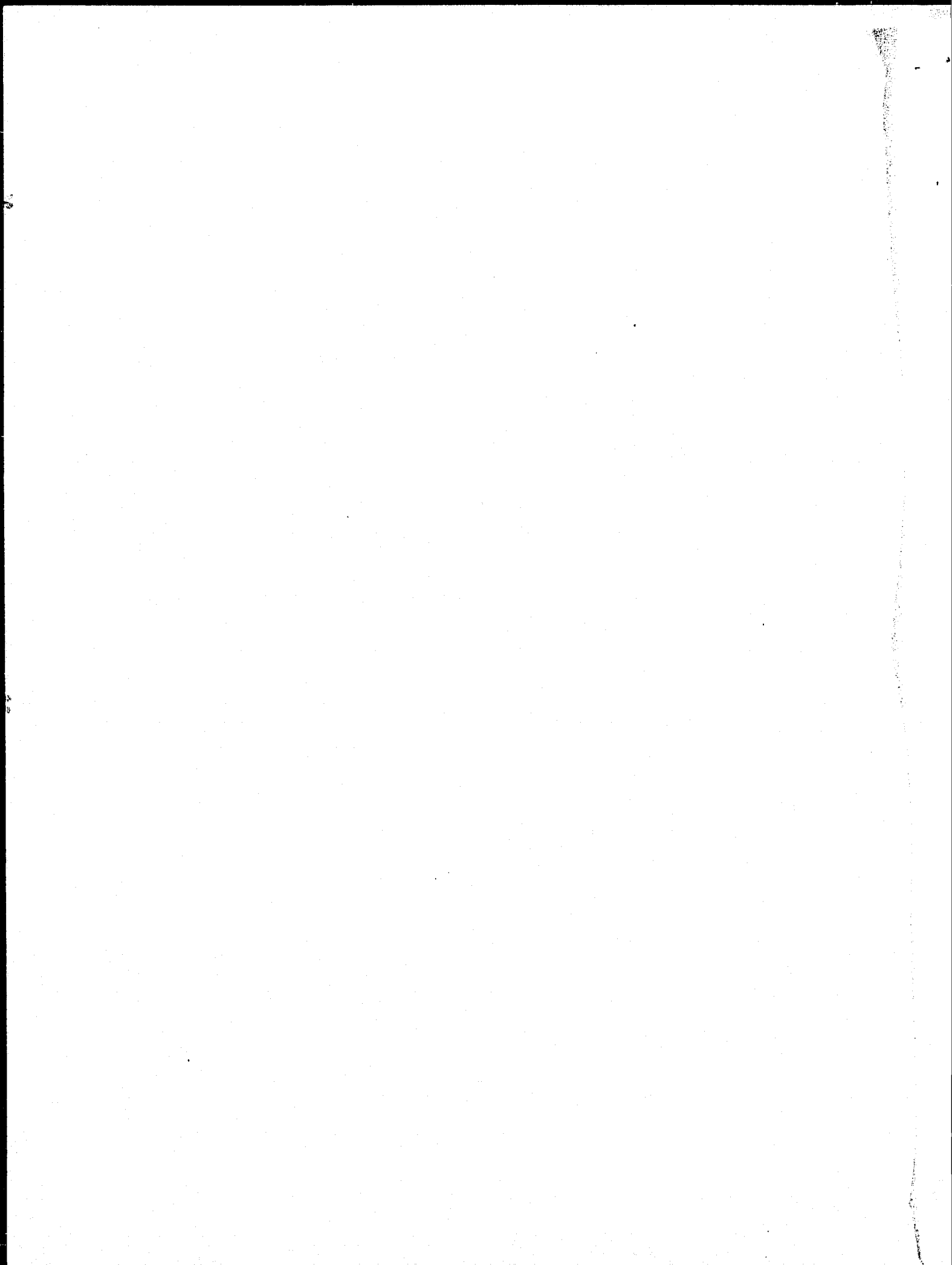
William C. Porth, Esq.,  
Suite 1-A  
1 Washington Square Village  
New York, New York 10012

  
Diane Serafin Blank

BELLAMY BLANK GOODMAN KELLY  
ROSS & STANLEY  
36 West 44th Street  
New York, New York 10036  
212 869-0020

Attorneys for Appellant

February 19, 1974



# BELLAMY BLANK GOODMAN KELLY ROSS & STANLEY

Attorneys at Law/36 West 44th Street, New York, N.Y. 10036/212 869-0020

February 19, 1974

A. Daniel Fusaro, Clerk  
United States Court of Appeals  
for the Second Circuit  
U. S. Court House  
Foley Square  
New York, N. Y. 10007


Re: Maria Diaz Faro v. New York  
University - No. 74-1041

Dear Mr. Fusaro:

Enclosed please find twenty-five copies of the  
brief for Appellant in the above case.

Two copies of the brief have been mailed to counsel  
for the Appellee in accordance with the Certificate of  
Service.

Sincerely yours,

  
Nancy E. Stanley

nes:llf  
encls.

CAROL BELLAMY/ DIANE SERAFIN BLANK/ JANICE GOODMAN  
MARY F. KELLY/ SUSAN C. ROSS/ NANCY E. STANLEY

LINDA FARIN ADMIN ASST